

SUMMARY AND ANALYSIS OF THE PROPOSED ORDER BY SECTION

- Preamble: The preamble identifies the premises underlying the Order, i.e., the needs for minimum standards for Federal employment, for special standards for more sensitive positions, and for a balanced program to meet these needs in a way which respects the rights of individuals and at the same time enables the Executive Branch to meet the Nation's security and personnel suitability needs. The preamble also cites the various laws constituting the basic authority for the personnel suitability program.
- Section 1. Revocation of E.O. 10450. This is a technical requirement, revoking Executive Order 10450, the current basis of the program.
- Section 2. Definitions. Definitions of the various terms used in the Order are provided to assure greater understanding of the Order and more uniform application. The definitions relating to suitability are critical to an understanding of the purpose of the Order. Of particular significance is the fact that the concepts of trustworthiness, fitness for Federal Service, and loyalty are subsumed under the term, suitability.
- Section 3. General. Defines the purposes of the Order which are to set uniform standards and procedures for (1) making decisions regarding the employment of persons in the Federal Service, (2) granting clearance for access to classified information, (3) assuring compliance with privacy and due process requirements, and (4) assuring effective management of the program. This Section also establishes a uniform program applicable to all Departments and Agencies, including both the competitive and excepted services. While the general policies of the Civil Service Commission and this Order will apply to all agencies to the extent practicable and appropriate, exemptions are granted for such highly sensitive agencies as CIA, NSA and FBI insofar as other Executive Orders or statutes may require or authorize different procedures. This order does not intend, for example, to curtail the authority of the Director of Central Intelligence pursuant to 50 USC 403(c) to terminate any officer or employee of the agency whenever he shall deem such termination necessary or advisable in the interest of the United States.

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Section 4. Applicability. Pursuant to the authority of P.L. 733 (Act of August 26, 1950), which permits the President to designate affected agencies, this Order extends the provisions of that Act beyond the Departments and Agencies specifically mentioned in the Act to apply to sensitive civilian positions anywhere in the Federal Service. This Section also relates the standards and procedures of this Order to determinations of trustworthiness, required by E.O. 11652, before individuals can be granted access to classified information. Finally, this Section seeks to unify employment and security clearance determinations by requiring a single decision for appointment to those positions involving access to information classified under E.O. 11652. It is intended that this decision relate only to the individual's general eligibility for employment or access and that it will not evaluate such factors as technical or professional qualifications or personal characteristics which are not relevant to a suitability determination under this Order but which may influence selection from among two or more candidates, decisions which must be made by others.

Section 5. Suitability Standards. This Section specifies two standards for Federal employment. The first concept is the traditional standard of efficiency of the service which must be met by all applicants for or employees of the Federal Government regardless of the sensitivity of the position. The second concept applies to General Standard Positions involving access to classified information and to Positions of Special Trust, and specifies that the employment must be "clearly consistent" with the national interest. The term, "clearly consistent", is intended to convey a positive standard for employment in positions of such sensitivity.

Section 6. Positions of Special Trust. This Section defines and prescribes certain procedures for designating Positions of Special Trust. Three basic criteria determine whether a position qualifies for this designation. First, the position must be such that any failure would affect the national interests as distinguished from those of an individual or group. Second, it must be such that any damage the individual could do would be irreparable. Third, the position must involve such independent responsibility that normal supervisory or oversight procedures cannot be counted on to prevent damage. Positions of Special Trust are subdivided into two categories, those which could affect the national security and those which, while not related to national security interests, never-

theless affect the national well-being to a substantial degree. A distinction between these two categories is essential in view of the fact that Cole v. Young held Public Law 733 to be applicable only to national security type positions. Subsection (b) of this Section specifies the criteria for designating a position as falling within either of the two categories. The criteria for national security positions are intended to define those positions which are the most sensitive from the point of view of national security interests regardless of the Department or Agency involved. It is recognized that a position requiring access to secret or confidential information (other than intelligence information) ordinarily is not so sensitive and it is intended that a position requiring such access shall not be designated a Position of Special Trust solely on that basis. The same Subsection specifies the criteria for designation of a National Welfare Position of Special Trust. Subsection (c) severely restricts the authority to designate a Position of Special Trust with the intention of limiting such designations to the absolute minimum necessary. In order to provide an accurate record of such designations, this Subsection also requires certain record keeping.

Section 7. Suitability Investigations. This Section provides guidelines for all aspects of suitability investigations.

Subsection (a) requires that an investigation be conducted before appointing an individual to any position in the Federal Service. As will be seen later in Subsections (c) and (d) below, the extent of investigation will vary according to the nature of the position.

Subsection (b), in keeping with one of the basic objectives of this Order, specifies certain limits on what aspects of an individual's background may be investigated. This Subsection includes the standards of the Privacy Act of 1974 relating to relevance, necessity, timeliness, and accuracy. It recognizes that some aspects of an individual's life are so personal that they may not properly be inquired about unless there is some genuine relationship to the standards and criteria by which the individual's suitability will be determined. This Subsection also seeks to reinforce the protection of the First Amendment by defining certain traditionally protected matters as being beyond the legitimate scope of investigative interest.

Subsection (c) specifies the National Agency Check with written inquiries as being the type of investigation required for the non-sensitive General Standard Positions

which comprise the majority of Federal positions. Although Subsection (e) permits expansion of the investigation to resolve significant adverse information, it is generally expected that the limited inquiry specified in this Subsection will constitute the minimal intrusion into the individual's privacy and at the same time adequately serve the public's interests. This Subsection also authorizes more limited inquiry for certain categories of employees when it is deemed to be in the public interest.

Subsection (d) prescribes the investigative requirements for a Position of Special Trust. In order to meet the requirement for a positive showing of suitability for a Position of Special Trust, it is clear that considerably more information about the individual will be required in order to permit a determination of suitability for such a position. The scope of investigation prescribed by this Subsection is intended to serve as a standard for the entire Federal Government, one objective being to facilitate the acceptance of each agency's investigations and suitability determinations by all other agencies. It is recognized, however, that for some agencies or for some positions within an agency special investigative coverage may be required and the Subsection provides for agreement to that effect under the general oversight of the Civil Service Commission. In order to reduce unnecessary investigation, this Subsection also provides that once an individual has been investigated for a Position of Special Trust and has thereafter completed five years of satisfactory, continuous employment in a Position of Special Trust, further background investigation, other than the routine five-year reinvestigation required by Subsection (j), shall not be required. This Subsection also recognizes that there may be extraordinary circumstances in which an individual must be appointed to a Position of Special Trust prior to completion of the background investigation and the Order provides for a carefully defined procedure to be followed in such instances, including a requirement that the investigation be completed within ninety days.

Subsection (e) provides for the expansion of the minimum scope of an inquiry or investigation whenever circumstances indicate that such expansion is necessary in order to acquire the information needed to make an appropriate suitability determination. This Subsection also requires that, in the interest of both accuracy and fair play, a personal interview with the subject be included as a

part of the investigative procedure whenever necessary to clarify or resolve potentially significant adverse information. Finally, this Subsection requires that any information falling within the purview of the FBI's jurisdiction be referred to that agency.

Subsection (f) provides detailed guidelines on the procedures to be observed in the routine personnel investigations conducted under this program. Subsection (1) specifies that, to the extent practicable, necessary information should be acquired directly from the individual. This Subsection recognizes, however, that other sources will also have to be contacted and, in order to inform both the public and the potential sources involved, it specifies some of the principal sources which may be included. Subsection (2) specifies the details which must be included in the information made available to the individual prior to the initiation of an investigation. Some of these details are required by the Privacy Act of 1974 and others, essentially a description of the investigative procedure, are added in the interest of fairness. Subsection (3) recognizes the individual's obligations in the investigative procedure and specifies certain kinds of information he or she must provide. Subsection (4) imposes certain limitations on the procedures and techniques which may be used in the routine personnel investigations conducted under this program. For the most part, these strictures are taken from the current Federal Personnel Manual but a few are added in order to comply with the spirit of the Privacy Act of 1974.

Subsection (g) continues the current procedure by which the Civil Service Commission is the agency primarily charged with the responsibility for suitability investigations, except for those agencies which may be required by law to conduct their own personnel investigations or which have agreed with the Civil Service Commission to do so.

Subsection (h) authorizes the Civil Service Commission to provide personnel investigative services for government agencies other than those of the Executive Branch.

Subsection (i) requires all agencies to give full faith and credit to the work of other agencies which may have previously investigated the same individual. This Subsection prohibits an agency from redoing the investigative work of an earlier report. The intent is to avoid

duplication of investigative work. If an earlier investigation did not include sufficient scope of coverage to meet current needs or if a particular source can be expected to have more recent knowledge of an individual, then there is no objection to supplementing an earlier investigation.

Subsection (j) recognizes that some Positions of Special Trust are so sensitive that the head of the department or agency should have the discretion to require periodic reinvestigation to determine that the individual continues to meet the standards and criteria for such position. It is not intended that this procedure be applied to General Standard Positions nor is it intended that the reinvestigation duplicate work previously accomplished. The Subsection specifies the maximum data to be acquired routinely and prescribes that each situation be reviewed on a case-by-case basis to determine what further investigative action may be appropriate to assure that the individual does continue to meet the standards. It is the intent of this Subsection to establish a uniform approach to the matter of reinvestigation. This Subsection finally defines the circumstances under which an investigation will be required of a former employee who has applied for reemployment.

Section 8. Adjudication. This Section seeks to assure a greater degree of uniformity in the administration of the personnel security program by defining in some detail the objectives of the adjudication process and procedures to be followed in making decisions. The Order recognizes that any adverse decision must be based on some rational connection between the facts of the individual's conduct or character and the pertinent standards as spelled out in Section 5. Where the conduct is of such a nature that the "nexus" is obvious, such as the use of a false identity, specific patterns of behavior are cited among the reasons for disqualification. More often, however, in order to avoid reliance on arbitrary or "per se" rules, the disqualification criteria are expressed in terms which include the reason for the individual's ineligibility, leaving it to the trained adjudicator to determine whether the facts of the individual case, taking into consideration the various factors mentioned in the Order, conform with the particular standard and criteria involved. Sexual misconduct, for example, including homosexual behavior, may be irrelevant under certain circumstances or with respect to some kinds of position or it may be highly relevant under other circumstances or with regard to more sensitive positions.

Subsection (c), in order to meet the objections of recent court decisions and to assure fairness and reasonableness in making suitability determinations, specifies in detail the various factors to be considered or, as the case may be, not to be considered in weighing evidence. Underlying all of these factors is the fundamental concept that the adjudication is an effort to assess the probability of the individual's future conduct on the basis of past conduct or personal characteristic. The enumeration of specific factors to be considered is intended to assure the relevance and accuracy of any such decision. Subsection (3) cites two additional evidentiary factors concerning Positions of Special Trust. The first is based on the premise that the individual is obligated to facilitate the process of investigation and adjudication. The second factor constitutes an official commitment by the Federal Government that the employee who has become involved in a situation which could be exploited by a foreign power and who reports the matter, shall be dealt with sympathetically. The objective is to prevent or to minimize further damage to the national interest by encouraging the individual to come forward as soon as he realizes the nature of his situation rather than to risk violating the law or exposing the national security interests to unnecessary hazard by attempting to hide his indiscretion. Clearly the Federal Government cannot promise that it will overlook a violation of law or completely ignore the circumstances of the individual's behavior. It is simply the intent of this Subsection to make a genuine and credible offer of as sympathetic a consideration of such a situation as circumstances allow. Subsection (4) cites two factors that should not be considered in making a suitability determination. The first, by forbidding the use of incomplete arrest data, requires that any criminal record be as accurate and complete as possible before it can be used. This requirement does not imply that the individual must be convicted of a crime before the information can be used in a suitability determination. It means simply that the decision may not be made solely on the basis of an arrest and that the adjudication must be based upon as much relevant detail as can be obtained. The second paragraph of this Subsection intends to reinforce the individual's rights as guaranteed by the First Amendment. It does not preclude an adverse determination on the basis of any illegal activity or conduct incompatible with the standards and criteria specified in this Order, but requires that the decision be based on the illegality or incompatibility of the behavior rather than on the mere exercise of the right.

Subsection (d) requires that cases handled under this program be adjudicated expeditiously and sets a time limit of 90 days after receipt of the final report of investigation by which time a final decision must be made. It is not intended that this requirement be met if the individual voluntarily withdraws his application or resigns prior to that time.

Subsection (e) requires that when a suitability determination is made concerning any individual, he or she shall be notified of that fact. In the case of a favorable determination, the offer of employment would be sufficient notice, but it is intended that in the case of an adverse determination or when a routine re-investigation of an employee in a Position of Special Trust has been completed favorably, the individual shall be so informed.

Section 9. Due Process and Adverse Determination Procedures. This Section specifies due process safeguards for the individual when it is necessary to deny him eligibility for appointment, to deny employment or to initiate separation proceedings. The procedure recognizes that, pursuant to the Privacy Act of 1974, the individual may, with limited exceptions, have access to his file. To deal fairly with the individual, to assure accuracy and completeness of the investigative file, and to avoid subsequent misunderstandings, this Order seeks to anticipate the eventual disclosure by requiring that the investigative process include confrontation of the individual when significant adverse information is disclosed. This section requires that, before a final decision is made, the individual shall be given the opportunity to explain or refute any such information.

Section 10. Procedures Concerning Positions Which Involve National Security Interests. This Section recognizes that under the authority of Public Law 733 (the Act of August 26, 1950) the head of the agency may take certain preventive actions with regard to positions affecting the national security which he could not take with respect to other positions. Among these actions are summary suspension from employment pending termination proceedings. This Section clarifies the requirements of the Law by specifying that a termination hearing shall be initiated within 120 days of the suspension. This Section also provides for alternative preventive actions not specified in P.L. 733 but regarded as being implicitly authorized by that Act. These include suspension of the individual's access



to classified information, revocation of security clearance, and reassignment to a position which does not involve the national security interests. Parallel- ing the provisions of E.O. 10865, this Section specifies certain due process procedures to be observed in taking these actions, but authorizes the head of the agency under certain circumstances to withhold information, if necessary, in the interest of national security and to protect the identities of certain sources. When a source must be protected and is not available for cross-examination, the individual is afforded certain additional safeguards. Further, as provided for in E.O. 10865, Subsection (d) recognizes that the head of each agency ultimately is responsible for the security of the operations of his agency and may deny an individual access to a specific category of classified information if, in his opinion, the security interests of the United States so require. This summary authority is limited to denial of access determinations. Except when the head of agency has statutory power of summary removal, any other preventive action, such as separation or reassignment to a General Standard Position, requires the due process safeguards specified in Sections 9 or 10 of this Order.

- Section 11. Reinstatement, Restoration to Duty and Reemployment. This Section seeks uniformity in the administration of the personnel suitability program by requiring consistency from agency to agency. It recognizes, however, that the head of each agency is the best judge of the sensitivity of the positions under his authority and this Section permits the reinstatement or reemployment of an individual previously disqualified or separated by any agency, provided the record is suitably documented. However, in the event the individual is to be employed by another Department or Agency, this Section also requires the concurrence of the Civil Service Commission.
- Section 12. Review of Adverse or Questionable Information Arising Subsequent to Favorable Suitability Determination. This Section requires appropriate investigation in the event of an allegation or complaint or other indication that an individual may not continue to meet the standards and criteria specified in this Order.
- Section 13. Program Management. Two keys to a more effective program, missing from the recent experience of the current program, are an effective "feedback" mechanism by which to judge the program and, more importantly, greater interest at the higher levels of the Executive Branch.

This Section intends to strengthen the management of the personnel suitability program by requiring more active policy interest at a higher level within the Executive Branch, by more clearly defining the responsibilities of the individual agencies and by providing for a more effective procedure by which to evaluate the effectiveness of the program. It also specifies standards of training and qualification of personnel involved in the investigation and adjudication of cases and sets out much stricter standards for the control, use and release of investigative material, as well as specifying tighter disposal schedules than have been observed in the past.